

No. 17-12466

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLIFFORD ERIC LUNDGREN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
Criminal Case No. 9:16-cr-80090-DTKH-2

**REPLY BRIEF OF DEFENDANT-
APPELLANT CLIFFORD ERIC LUNDGREN**

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
Mark C. Rifkin
Randall S. Newman
270 Madison Avenue
New York, NY 10016
Tel: 212-545-4600
Email: rifkin@whafh.com
newman@whafh.com

Hugo A. Rodriguez, Esq.
1210 Washington Avenue
Miami Beach, FL 33139
Tel: 305-373-1200
Email: hugolaw@aol.com

Counsel for Defendant-Appellant

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, Appellant, Clifford Eric Lundgren, provides the following list of interested persons:

Altchiler, Robert Y.
Barnes, Antonio J.
Cohen, Jacob Alain
Dell Inc. (DVMT)
Ferrer, Wifredo A.
Garcia, Rolando
Golder, Randee J.
Greenberg, Benjamin G.
Lundgren, Clifford Eric
Microsoft Corporation (MSFT)
Morris, Lothrop
Newman, Randall S.
Reinhart, Bruce E.
Rifkin, Mark C.
Rodriguez, Hugo A.
Sanchez, Lily Ann
Schlessinger, Stephen
Smachetti, Emily M.
Wolff, Robert J.
Wolf Haldenstein Adler Freeman & Herz LLP

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INTRODUCTION

The Government's response to Lundgren's opening brief makes this case easy for the Court to decide. Lundgren's principal argument is that the Government failed to meet its burden to prove the value of the infringed product, leading the trial court to base its Guideline calculation on the value of a *fundamentally different product: a copy of Windows OS with a new license and product key*. The Government's response fails to answer the substance of Lundgren's argument. Notwithstanding the considerable rhetoric, complications, and obfuscations in its lengthy response brief, *nowhere does the Government point to any evidence of the value of the product Lundgren was convicted of infringing: a free copy of Windows OS without a license or a product key*.

Moreover, the response brief *admits* that the Government failed to prove the value of Windows OS without a license or product key, that the Windows software was free to every Dell refurbisher, and that every Dell computer at issue here included a Certificate of Authenticity ("COA") evidencing a valid license and product key affixed to each machine (which the Government also admits belong to the hardware rather than the user). The reinstallation disc was merely a "recovery solution" – *i.e.*, a means of getting the free OS back onto admittedly authorized computers in the event of a catastrophic failure. Indeed, the trial court found that any consumer who lost his or her reinstallation disc could obtain a *free*

replacement copy from the original equipment manufacturer. Vol. II, DOC 145, p. 210. The Government attempts to excuse its failure to prove the value of the infringed product on the basis that there is no market for a free copy of Windows OS without a license or product key. There is no market for that product *because it has no value*. The Court should not overlook that basic economic principle, which does not relieve the Government of its burden of proof or justify the trial court's erroneous calculation of the value of the infringed product.

The Government also attempts to argue that the free copy of Windows OS without a new license or product key is “visually and functionally equivalent” to a copy of the software with a new license and product key. There are at least three flaws in the Government's argument. *First*, as the Government admits, an inactivated copy of Windows OS “nags” users with constant prompts to enter a product key to activate Windows, which would alert any consumer to the fact that the operating system had not been licensed. *Second*, Microsoft's end-user license agreement expressly provides that an inactivated copy of the operating system ceases to function after the initial 30-day trial period. Vol. I, DOC 145, pp. 128-29. And *third*, despite the Government's argument, the trial court found that at least one version of the operating system (either Windows XP or Windows 7) shuts down after the 30-day trial period. Vol. II, DOC 145, p. 212.

For these reasons, as discussed more fully below, because the Government

failed to meet its burden to prove the value of the infringed product, leading the trial court to erroneously base its Guideline calculation on the value of a *fundamentally different product*, the Court must reverse Lundgren’s sentence.

ARGUMENT

I. THE GOVERNMENT ADMITS IT OFFERED NO EVIDENCE OF THE VALUE OF THE WINDOWS OS WITHOUT A NEW LICENSE AND PRODUCT KEY

To obfuscate the issues, the Government argues that Lundgren’s appeal “is about a battle of the experts” as to the value of the infringed product Lundgren was convicted of infringing: Windows OS without a license or a product key contained on a Dell reinstallation disc. That is not Lundgren’s argument: Lundgren is not asking this Court to accept the testimony of his expert as evidence of the value of the infringed product. Rather, Lundgren argues that the Government failed to meet its burden to prove the value of the Windows OS without a license and product key and offered no evidence to support that value.¹ Instead, the Government offered evidence of the value of the software with a brand new license and product key, a completely different – and much more valuable – product than what Lundgren pled guilty to infringing. Significantly, The Government offered no evidence from its expert witness at the sentencing, Jonathan McGloin of Microsoft, or any other witness that reinstallation discs with a new license and product key were the same

¹ The Government did not dispute that it bears the burden to prove the value of the infringed item.

thing as discs without a license and product key or that the two items had the same value.

Indeed, the Government admits it offered no evidence of the value of Windows OS without a license or product key. The Government blames its lack of evidence on the fact that there is no market for copies of Windows OS without a license and product key. The reason there is no market for a copy of Windows OS without a product key is, as the Government admits, that a licensed owner of Windows “can download replacement Microsoft software for free after proving that he or she has a genuine license.” Br. at 51. And of course, as the Government admits, every Dell computer had a COA evidencing a genuine Windows license and product key affixed to it. Br. at 17; Vol. I, DOC 145, p. 47.

Regardless of the reason for the lack of a market for Windows OS without a product key – which was already affixed to every Dell computer – the simple fact is that the Government failed to prove the value of the infringed product, which led the trial court to base its Guideline calculation on the value of a completely different product (*i.e.*, Windows OS *with* a new product key). The value of that product is obviously much greater than the value of free software without a new product key.

Although the Government makes much of the fact that a replacement copy of the Windows OS requires proof of a genuine Microsoft license, the Government

admits that *every* Dell computer manufactured during the relevant time period had a COA evidencing a genuine Microsoft license and product key affixed to the machine; that the Microsoft license is “married” to the computer; and that every owner of a Dell computer was able to obtain a replacement copy of Windows OS using the COA and product key affixed to the computer. Br. at 17, 25 and 51. Given those admissions, it is clear that no market exists for replacement Windows OS because the software can be readily obtained *for free*. Indeed, as the trial court found and as the Government concedes, anyone with a valid Windows license could obtain a *free* reinstallation disc, which included a full version of the Windows OS, from the original equipment manufacturer (Dell in this case) using the Windows COA affixed to each and every computer at issue here. Br. at 51; Vol. II, DOC 145, p. 210.

Faced with the undeniable fact that replacement copies of the Windows OS are easily obtainable for free, the Government has concocted two illogical hypothetical situations to support its argument.

First, the Government hypothesizes that Lundgren and his co-defendant, Wolff, intended to sell reinstallation discs to Dell refurbishers, who intended to install a Windows OS on refurbished Dell computers from the reinstallation discs using so-called “unconsumed” product keys. Br. at 18. The Government offered no evidence to support its illogical hypothesis, and undisputed facts completely

undermine it.² As the Government concedes, *every* Dell computer during the relevant time period had a genuine Windows COA, including a valid license and product key, affixed to it. Br. at 17. No Dell refurbisher would have ever needed to use an “unconsumed” product key to activate Windows because a *valid product key was affixed to each and every Dell computer*. Refurbishers simply use the existing valid product key to activate Windows on the refurbished Dell computers. No matter how hard the Government tries to argue otherwise, it cannot escape the fact that refurbishers do not need to use any “unconsumed” product key to activate Windows.

Next, the Government hypothesizes that Lundgren intended to sell reinstallation discs to Dell refurbishers, who would use them to install an unlicensed version of Windows OS on a refurbished Dell computer so that the computer had a functioning (but unauthorized) operating system. That hypothesis also makes no sense because every Dell computer at issue here had a genuine Windows COA and valid product key affixed to it.³

² There is no dispute that Lundgren and Wolff planned to sell reinstallation discs containing replacement Windows OS to Dell refurbishers. There is also no dispute that during the relevant time period, every Dell computer sold had a COA and product key affixed to the computer. Therefore, during the relevant time period, a Dell refurbisher had a valid Microsoft license and product key for *every* computer it intended to refurbish.

³ If the Court were to ignore the fact that every computer at issue here had a Windows COA and accept the Government’s hypothesis that some non-Dell computers did not have a valid COA and product key affixed to it, no computer

II. THE GOVERNMENT’S EXPERT DID NOT SUPPORT ITS ARGUMENT AND PROVIDED NO BASIS FOR THE DISTRICT COURT TO VALUE THE INFRINGED PRODUCT

To equate the value of Dell reinstallation discs without a product key to the value of Microsoft installation discs with new licenses and product keys, the Government argues that the unactivated Windows OS installed on a computer from a Dell reinstallation disc had the same functionality as a licensed version of the operating system (*i.e.*, one that has been activated with a valid product key). However, the Government’s expert witness McGloin, admitted that an unactivated copy of Windows XP “could only be used off line without connecting to the internet” after the initial 30-day trial period before the software expired. Vol, I, DOC 145, p. 95. That is not the same functionality at all. Moreover, all three tests done by McGloin do not support the government’s argument. Indeed, McGloin’s tests show that an unlicensed – unactivated – copy of Windows would not be marketable at all.

In his first test, McGloin installed Microsoft Windows XP onto a Compaq Presario computer using one of Lundgren’s discs. He did not enter a product key during the installation process. Thereafter, because McGloin did not enter a product key, Windows repeatedly “nagged” him to enter a product key and warned him that updates would not be installed until a valid product key was

refurbisher could realistically sell a computer with an unlicensed copy of Windows OS due to functionality restrictions built into the software.

entered. Computers that have not been authorized with a valid product key, which constantly “nag” users for the product key and cannot be updated, are unmarketable. Refurbishers could not sell such computers with only “unauthorized” copies of the Windows OS installed because of the way Windows informs consumers of illegitimacy. In short, Windows OS effectively prevents a Dell refurbisher from selling an unlicensed computer to a consumer as that consumer would instantly recognize (via the “nagging” prompts) that the OS on the refurbished computer was unlicensed.⁴

In McGloin’s second test, he installed Windows 7 onto a Lenovo computer using Lundgren’s disc. In that test, McGloin *entered* the product key from the COA attached to the back of the Lenovo computer itself to activate the Windows OS. McGloin used a valid product key from the back of the Lenovo computer to activate the software. The fact that Lundgren’s disc worked after entering a valid product key affixed to the computer is irrelevant as Lundgren’s argument is that Microsoft Windows OS *without* a product key has little or no value.⁵ Likewise, the

⁴ Furthermore, McGloin failed to perform the Windows OS test on the Compaq Presario beyond 30 days.

⁵ The Government argues that McGloin activated the Widows 7 software with an “unconsumed” product key to suggest that Lundgren’s reinstallation discs could be used for a nefarious purpose. But McGloin used Lundgren’s reinstallation disc for the exact purpose it was intended: to reinstall Windows on a computer that already had a valid Windows license. Microsoft was not harmed at all by that use because McGloin could have obtained a free reinstallation disc from Lenovo or Compaq (the OEMs of the computers McGloin used for his tests), since he already had a

Government's argument that McGloin was not "nagged" to enter the product key again, after he entered it during the installation process, is specious. Once the product key from the back of the Lenovo computer was entered, the Windows software on that computer was fully activated.

In his third test, McGloin again installed Windows 7 using one of Lundgren's reinstallation discs. This time, he did *not* enter a product key when prompted to do so. Thereafter, Windows repeatedly displayed a message that it was not validly activated and repeatedly prompted McGloin to buy a product key online. Vol. I, DOC 145, pp. 101-02. Even though McGloin was able to install the operating system, as a practical matter, the fact that Windows 7 "nagged" him to buy a product key to activate the software would have prevented refurbishers from selling computers with inactivated copies of Windows OS to consumers.

During his testimony at the sentencing, McGloin denied that Windows 7 ceased to operate if no product key was entered during the initial 30-day trial period. Vol. I, DOC 145, p. 96:2-4. He claimed that Windows functioned beyond 30 days⁶ but "nagged" users to enter a product key. McGloin did not conduct any

valid product key on the computers, without buying another copy of Windows with a new product key from Microsoft.

⁶ As discussed above, McGloin admitted that an unactivated version of the Windows OS could only be used "off line without connecting to the internet" after the initial 30-day trial period for the software expired. Vol. I, DOC 145, p. 95:11-12.

tests of Windows 7 after the 30-day trial period to substantiate his claim. Moreover, McGloin appears to have been confused about the functionality of Windows 7 after the 30-day trial period. He testified that a “functionality” feature was first built into Windows Vista, which disabled the operating system if no product key was entered within 30 days, implying that Windows 7 was released before Windows Vista and did not include the “functionality feature.” Vol. I, DOC 145, p. 95:24-25. However, Windows Vista was actually released three years *before* Windows 7.⁷ The functionality feature, which disabled the operating system after 30 days, was built into the operating system long before Windows 7 was released.

Thus, McGloin’s tests actually support Lundgren’s argument that a replacement copy of Windows OS without a valid product key has little or no value to any computer refurbisher.

III. THE REAL FACTS REFUTE THE GOVERNMENT’S ARGUMENT AND THE DISTRICT COURT’S IMPLICIT ASSUMPTION THAT A COPY OF THE WINDOWS OS WITHOUT A PRODUCT KEY HAD THE SAME VALUE AS A COPY WITH A PRODUCT KEY

Most of the Government’s arguments are built upon an implicit assumption that Dell refurbishers did or would have installed the Windows OS onto each Dell computer from the individual reinstallation discs that Lundgren made. No

⁷ See https://en.wikipedia.org/wiki/Timeline_of_Microsoft_Windows (last visited Dec. 13, 2017) (Windows Vista released November 30, 2006; Windows 7 released October 22, 2009).

refurbisher testified that that was the case. That assumption is unwarranted and illogical. No doubt, the Dell refurbishers had their own copy of the Windows OS – in effect, a “master” copy – which they could have used to install the software on refurbished Dell computers using the product key that the Government admits was affixed to each and every Dell computer without opening individual reinstallation discs to do so. Obviously, the refurbishers were able to install the Windows OS on the computers without actually receiving any reinstallation discs from Lundgren or his co-defendant, Wolff.

Building upon that assumption, the Government argues that Lundgren’s discs deprived Microsoft of sales of genuine copies of the software. That argument is nonsense. As the District Court found, and as the Government concedes, anyone with a valid Windows license could obtain a *free* reinstallation disc from the original equipment manufacturer (in this case, Dell). Every Dell computer in this case had a COA evidencing a valid Windows license affixed to it. Thus, even if the Court were to accept the Government’s assumption that refurbishers intended to install the Windows OS from the individual reinstallation discs rather than their own “master” copy of the software, they would not have purchased any copies of the software from Microsoft. Rather, they would have obtained free copies of the reinstallation discs – which included full copies of the Windows OS – from Dell using the Dell service tag for each individual computer. The refurbishers would

have been inconvenienced by having to request individual reinstallation discs for each computer, and Dell would have been inconvenienced by having to supply those free discs to the refurbishers. In reality, what Lundgren did simply allowed the refurbishers to avoid that inconvenience, and the true value of the infringed product – if it had any value at all – was the nominal value of providing that convenience to the refurbishers.

The Government also argues that refurbishers often used “unconsumed” product keys from one computer to activate Windows OS on *another* computer. Br. at 46. That argument is completely irrelevant here. As the Government concedes, *every Dell computer at issue in this case had a genuine COA – including a valid product key – affixed to it.* Br. at 3. No Dell refurbisher had to use a product key from one computer on another computer in order to activate Windows on any computer at issue here.⁸

More to the point, instead of adopting the Government’s unsubstantiated arguments regarding the assumed value of the Windows OS without a product key, the Court should consider the real facts in deciding whether the infringed product had the same value as a copy of the operating system with a product key. The real facts make it absolutely clear that the District Court miscalculated the value of the

⁸ The Government offered no evidence that any refurbisher tried to use “unconsumed” product keys to change the version of Windows that had been installed on the refurbished Dell computers.

infringed product under the Guidelines.

Most importantly, Microsoft's agreement with Dell, an OEM, required Dell to provide a *free* "recovery solution" to the purchaser of every new computer to be used in the event of a catastrophic malfunction. As the Government admits in its response brief, the recovery solution came in different forms, one of which was a reinstallation disc. Br. at 15. Undoubtedly, many of the used Dell computers to be refurbished came with reinstallation discs. Likewise, some of those computers acquired by Dell refurbishers undoubtedly did not include a reinstallation disc. However, a refurbisher did not need a reinstallation disc to reinstall the Windows OS. A free copy of the operating system was readily and legally obtainable on the internet, and the refurbishers were able to install the free copy of Windows onto all of the refurbished computers without obtaining reinstallation discs from Lundgren or Wolff – or from anyone else – by using the COA and product key affixed to every Dell computer at issue in this case and to virtually every other brand-name computer at that time. Vol. I, DOC 145, p. 49.

For that reason, refurbishers needed the reinstallation disc only to provide the "recovery solution" to consumers. As the Government readily admits, Dell refurbishers could obtain *free* replacement reinstallation discs from Dell by providing the service tag or serial number for the computer to Dell. Br. at 51 n.15. Doing so would have been time consuming for the refurbishers. Despite the

Government's argument and the District Court's speculation, Lundgren made the reinstallation discs not for the Dell refurbishers to use to install the Windows OS on the refurbished computers, but rather for the refurbishers to include as a "recovery solution" when they resold the computers. Since the refurbishers already had a COA (including a valid product key) affixed to every refurbished computer, Lundgren made the reinstallation discs simply as a matter of convenience for the refurbishers to avoid having to obtain the discs for free from Dell.

The District Court failed to understand that the Windows OS on Lundgren's reinstallation discs was worth nothing more than the minimal effort the refurbishers would have expended to obtain a free replacement copy of the "recovery solution" from Dell. Since the reinstallation discs were available for free from Dell, the refurbishers would be unwilling to pay any more than a nominal sum to purchase the discs in bulk from anyone to avoid the inconvenience of having to obtain free discs from Dell using the serial number or service tag for each individual computer. The Government offered no evidence of the value of the inconvenience to the refurbishers, just as it offered no evidence of the value of the Windows OS without a product key.

Because the Government utterly failed to meet its burden to prove the value of the infringed product or what refurbishers would have paid to avoid the inconvenience of having to obtain free replacement reinstallation discs from Dell,

the District Court clearly erred and had no basis to compute the value of the infringed product under the Guidelines. For that reason, the Court must reverse Lundgren's sentence.

CONCLUSION

For all the foregoing reasons, Lundgren respectfully requests that this Court vacate the sentence imposed by the District Court and remand this case back to the District Court for further proceedings.

Dated: January 2, 2018

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

By: s/ Randall S. Newman
Mark C. Rifkin
Randall S. Newman
270 Madison Avenue
New York, NY 10016
(212) 545-4600
rifkin@whafh.com
newman@whafh.com

*Attorney for Defendant/Appellant,
Clifford Eric Lundgren*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman type style and contains exactly 3,599 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

Dated: January 2, 2018

s/ Randall S. Newman

Randall S. Newman

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2017, the foregoing Brief of Defendant-Appellant Clifford Eric Lundgren was served on all counsel of record by CM/ECF and seven copies of the same were mailed to the Clerk of the Court via Federal Express overnight delivery.

By: s/ Randall S. Newman